Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1806

JESSE L. GETZ,

Petitioner,

VS.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

EUGENE E. KLECAN
Klecan & Roach, P.A.
Suite 1221, 505 Marquette NW
Albuquerque, New Mexico 87101
Attorney for Petitioner

INDEX

	Page
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	15
APPENDIX A	16
Opinion of the Supreme Court of New Mexico	
APPENDIX B	24
Order Denying Petitioner's Motion for Rehearing	
APPENDIX C	25
Trial Court's Findings of Fact and Conclusions of Law	
APPENDIX D	30
Judgment for Petitioner Entered by District Court	
APPENDIX E	31
Petitioner's Motion for Rehearing	

TABLE OF AUTHORITIES

CASES:	Page
Anaya v. Scarborough 75 NM 702, 705, 410 P2d 732 (1966)	8
Anderson v. Santa Anna 116 US 356, 365 (1885)	12
Argersinger v. Hamlin 407 US 25, 38 (1971)	7
Aschenbrenner v. United States Fid. & G. Co. 292 US 80, 84 (1933)	12
Berger v. United States 255 US 22 (1921)	9
Blackledge v. Perry 417 US 21, 25 n.4 (1974)	8
Bradley v. School Board of City of Richmond, Va. 324 F.Supp. 439, 445 (E.D. Pa. 1971)	8
Brinkerhoff-Farris Co. v. Hill 281 US 673, 680 (1929)	7, 15
Bubany v. New York Life Insurance Company 39 NM 560, 567, 51 P2d 864 (1935)	11, 13
Chavez v. City of Albuquerque Unreported Opinion filed April 13, 1976	11
Commonwealth Coatings Corp. v. Continental Casualty Co. 393 US 145, 148 (1968)	9
Farmers' & Merchants' Bank v. Federal Reserve Bank 262 US 649, 660 (1923)	12
Fowler v. First National Life 71 NM 364, 378, P2d 605 (1963)	12
Great Northern Ry. v. Sunburst Co. 287 US 358, 366 (1932)	15

	Page
Hendrickson v. Apperson 245 US 105, 112 (1917)	12
Hicks v. State 88 NM 588, 594, 544 P2d 1153 (1976)	14
Holt v. Virginia 381 US 131, 136 (1965)	7
Johnson v. Mississippi 403 US 212 (1971)	7
Jones v. Board of School Directors 55 NM 195, 198, 230 P2d 231 (1951)	12
Lindsey v. Normet 405 US 56, 57 (1971)	10
Linkletter v. Walker 381 US 618, 628 (1964)	14
Louisiana v. Pilsbury 105 US 278, 294 (1881)	12, 13
Lozano v. Archer 71 NM 175, 180-182, 376 P2d 963 (1962)	13
Lynch v. United States 292 US 571, 579 (1933)	7
Missouri v. Gehner 281 US 313, 320 (1929)	15
Murchison 349 US 133, 136 (1954)	7, 9
Peters v. Kiff 407 US 493, 503 (1971)	9
Sawyer v. Washington National Insurance Co. 78 NM 201, 203, 429 P2d 901 (1967)	11, 13
Snead v. Adams Construction Co. 72 NM 94, 96-97, 380 P2d 836 (1963)	13

	Page
State v. Armijo 38 NM 73, 81, 28 P2d 511 (1933)	7
Stipich v. Metropolitan Life Insurance Co. 277 US 311 (1927)	12
United States v. Grinnel Corp. 384 US 563, 583 (1966)	9
Withrow v. Larkin 421 US 35, 47 (1974)	8, 9
FEDERAL STATUTES:	
28 USC §1257 (3)	2
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Amendment XIV	2, 3, 7, 10
Constitution of New Mexico, Art. VI, §2	3, 7
Constitution of New Mexico, Art. VI, §5	3, 5, 10
Constitution of New Mexico, Art. VI, §18	3, 8
MISCELLANEOUS:	
Archives of Environmental Health Vol. 29, No. 2, at 79	14
State Bar of New Mexico Bulletin Vol. 16, No. 5, at 1736	1
N.M.S.A. §59-10-12.1B	13

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

JESSE L. GETZ,

Petitioner,

VS.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

The Petitioner, Jesse L. Getz, prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of New Mexico entered on March 11, 1977. Petition for rehearing was denied on March 23, 1977.

OPINION BELOW

The opinion of the Supreme Court of New Mexico is reported in the State Bar of New Mexico Bulletin, Vol. 16,

No. 5, at 1736. The opinion appears at Appendix A, infra, page 16.

JURISDICTION

The final order of the New Mexico Supreme Court was made and entered on March 11, 1977. The order denying Petition for Rehearing was entered on March 23, 1977. That order appears at Appendix B, infra, page 24, Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Whether Petitioner was denied due process of law and equal protection of the law, as guaranteed by the Fourteenth Amendment, by the participation of Chief Justice Oman in the opinion after the Chief Justice had publicly expressed his bias and prejudice against Petitioner.

2. Whether Petitioner was denied equal protection of the law by the order of the New Mexico Supreme Court which arbitrarily and capriciously applied a more stringent test of disability to this Petitioner than it applies to others similarly situated.

3. Whether Petitioner was deprived of his property without due process of law and was denied equal protection of the law by the order of the New Mexico Supreme Court which refused to follow state law and public policy existing at the time a contract of insurance was formed between Petitioner and Respondent.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV:

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of New Mexico, Article VI, §18:

"No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause . . . in which he has an interest."

Constitution of New Mexico, Article VI, §5:

"A majority of the justices of the Supreme Court shall be necessary to constitute a quorum for the transaction of business, and a majority of the justices must concur in any judgment of the court."

Constitution of New Mexico, Article VI, §2:

"[A]n aggrieved party shall have an absolute right to one appeal."

STATEMENT

Petitioner was enrolled in a group life insurance policy issued to his employer, Sandia Corporation, by Equitable Life Assurance Society, Respondent. The full cost of the policy was borne by the employee. The policy provided for total disability payments. While Petitioner was covered by the insurance policy, he suffered a coronary thrombosis which resulted in myocardial infarction. As a result, Peti-

tioner presently suffers from angina pectoris and myocardial insufficiency. These conditions are induced by mental stress and by physical activity. Petitioner was unable to perform the tasks of his employment because of his permanent heart condition, the side effects of necessary medication, and the need to avoid stress and physical activity. Petitioner had been employed by Sandia Corporation as a design engineer for 16 years. The unavoidable stress of work would cause chest pain and myocardial angina which rendered Petitioner unable to work. Petitioner was fired by Sandia Corporation in September of 1973 because of his inability to cope with the demands of his work. Petitioner was 55 years old at the time of his discharge. He has been unable to secure any employment since his discharge.

Petitioner applied for total disability payments from Equitable Life Assurance Society, Respondent, pursuant to his policy of insurance. That application was denied. Petitioner than filed suit on September 23, 1974. The trial court found that Petitioner was totally and permanently disabled because of his heart condition. The trial court's findings of fact and conclusions of law appear at Appendix C, infra, page 25. The Judgment for Petitioner, entered in district court on September 18, 1975, appears at Appendix D, infra, page 30. The trial court found that Petitioner is unable to engage in any occupation or perform any work for compensation for which he is or may become reasonably fitted by education, training or experience. Petitioner was held to be totally disabled as defined in the insurance policy and in New Mexico cases and unable to be employed without hazarding his life or health. The trial court found that any job for which Petitioner could reasonably become fitted would involve stress and the resulting possibility of angina pectoris.

Respondent appealed to the New Mexico Supreme Court which reversed the trial court's decision on March 11, 1977.

At the time of oral argument before the New Mexico Supreme Court, Chief Justice Oman stated from the bench that he had had several heart attacks and yet he was still working. He stated that for that reason he probably should not sit on the case. Counsel for Petitioner presumed that the Chief Justice would recuse himself and not participate in the decision of the Court. The Chief Justice instead did participate and, in fact, wrote the opinion himself. The opinion reversed the finding by the trial court that Petitioner was totally disabled. The personal reaction of Chief Justice Oman to his own heart attacks forms the basis of the court's decision. The opinion stated in part:

> "There is evidence that Getz' duties in engineering design did involve some stress. . . . However, because his particular duties caused him some discomfort and distress three or four times a week . . . it does not follow that he is wholly and continuously disabled from performing the duties of any occupation." (pages 5-6, opinion)

The "distress and discomfort" referred to are the symptoms of angina pectoris, a suffocation of the heart resulting from a sudden contraction of the arteries which supply blood to the heart muscle.

There is no procedure in New Mexico for disqualifying a State Supreme Court justice. In any event, Petitioner did not learn of the bias and prejudice of the Chief Justice against Petitioner until the time of oral arguments.

The Constitution of New Mexico, Article VI, §5, requires a majority of the justices to concur in any judgment

of the Court. Three justices constitute a majority. In the present case, oral arguments were heard by three justices — Chief Justice Oman, Justice Montoya and District Judge Payne. The decision on this appeal was delayed much longer than usual, for no apparent reason. Oral arguments were made on June 23, 1976. The opinion was not filed until March 11, 1977. This nine-month period is much longer than the New Mexico Supreme Court usually takes to decide a case. Between the time of oral arguments and the filing of the opinion, Justice Montoya retired from the bench. Petitioner can only surmise that the court was unable to decide this case while Justice Montoya was on the bench. The third justice concurring in the opinion had never participated in the case and had not heard the oral arguments. Chief Justice Oman had announced his retirement from the bench approximately three weeks before the opinion in this case was filed. He did retire from the bench within three weeks after the opinion was filed. However, the opinion was filed in time for the Chief Justice to rule on the Petition for Rehearing.

Petitioner moved for a rehearing based in part on the participation of Chief Justice Oman. The Motion for Rehearing appears at Appendix E, infra, page 31. In the Motion for Rehearing, Petitioner stated that he had been denied due process and equal protection of the law because of the unfair tribunal which ruled on his appeal. Petitioner further charged that he had been denied due process because of the refusal of the New Mexico Supreme Court to apply the law existing at the time the contract of insurance was formed. Petitioner also charged that he had been denied equal protection of the law because the State Supreme Court applied a different, more stringent standard in determining his disability than it applied to others similarly situated.

The Motion for Rehearing was denied, without opinion, on March 23, 1977, only a few days before Chief Justice Oman left the bench.

The acts complained of are acts of the New Mexico Supreme Court, committed unexpectedly at the end of the proceedings. Petitioner raised the federal questions at the first available opportunity in his Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the administration of justice in the state courts. The Fourteenth Amendment forbids any state to deprive any person of his property without due process of law or to deny any person equal protection of the law. This federal guaranty of due process extends to state action through its judicial as well as through its legislative or executive branch of government. *Brinkerhoff-Farris Co. v. Hill*, 281 U.S. 673, 680 (1929). The contract of insurance involved here constitutes property, *Lynch v. United States*, 292 U.S. 571, 579 (1933), and the rights of Petitioner arising out of it are protected by the Fourteenth Amendment. Petitioner requests that this Court exercise its serious responsibility of compelling the New Mexico Supreme Court to conform to the federal Constitution. *Argersinger v. Hamlin*, 407 U.S. 25, 38 (1971).

I

Due process requires a fair and impartial tribunal. In re *Murchison*, 349 U.S. 133, 136 (1954), *Johnson v. Mississippi*, 403 U.S. 212 (1971). *Holt v. Virginia*, 381 U.S. 131, 136 (1965). *State v. Armijo*, 38 N.M. 73, 81, 28 P.2d 511 (1933).

A biased decisionmaker is "constitutionally unacceptable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1974). Petitioner's right to due process has been seriously violated by the failure of the New Mexico Supreme Court to provide an impartial tribunal to decide the appeal. The Constitution of New Mexico, Article VI, §2, guarantees a party the absolute right to an appeal. Even if due process did not require an appeal, once it has been granted the appeal must satisfy due process requirements. *Blackledge v. Perry*, 417 U.S. 21, 25 n.4 (1974). The remarks of Chief Justice Oman at the time of oral arguments reveal that he had prejudged the matter in issue. A principal issue in the case was whether Petitioner was totally disabled because of his heart condition. This issue was the basis for the reversal. The statements of the Chief Justice unambiguously demonstrate that he had already decided that a person who has had a heart attack, or even several heart attacks, is not totally disabled and should continue to work. Prejudgment as to the issues requires a judge to recuse himself in order to satisfy due process requirements. *Bradley v. School Board of City of Richmond, Virginia*, 324 F.Supp. 439, 445 (E.D. Pa. 1971). Petitioner's right to due process was violated since his case was decided on appeal by the judge who was prejudiced and biased against him, as those terms have been defined by decisions of this Court.

The Constitution of New Mexico prohibits the judge of any court from sitting on a case in which he has an interest. New Mexico Constitution, Article VI, §18. The "interest" which requires a judge to recuse himself may be a bias or prejudice. State *ex rel Anaya v. Scarborough*, 75 N.M. 702, 705, 410 P.2d 732 (1966). Petitioner presumed that Chief Justice Oman would abide by the clear dictate of the state Constitution and would refrain from participating in the decision.

The test for determining the sufficiency of the prejudice or bias was laid down by this Court in *Berger v. United States*, 255 U.S. 22 (1921). Due process is violated by the bias or prejudice of the judge where there are facts which fairly support the charge of a "bent of mind that may prevent or impede impartiality of judgment." *Berger*, supra, at 33-34. In the present case, as in *Berger*, there are definite facts which demonstrate the partiality of judgment. We are not dealing with merely a suspicion of bias or prejudice. The charge of bias is based on definite statements made by Chief Justice Oman on June 23, 1976, in the New Mexico Supreme Court Building. The bias of the judge stems from an extrajudicial source as required by *United States v. Grinnel Corp.*, 384 U.S. 563, 5D 3 (1966). That bias was overall — it went to the very substance of Petitioner's claim.

Chief Justice Oman had prior, personal knowledge of the disputed issue in the case. He had what he believed to be accurate and universal knowledge of the effect of a heart attack upon an individual's ability to continue working. This existing opinion handicapped Petitioner.

Even if there were no showing of actual bias, this Court has held that "due process is denied by circumstances that create the likelihood or the appearance of bias." *Peters v. Kiff*, 407 U.S. 493, 502 (1971). *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968). The circumstances in the present case were such as to create a serious "probability of unfairness." In re *Murchison*, 349 U.S. at 136. The probability of actual bias on the part of the New Mexico appeals court is "too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S., at 47.

The New Mexico Constitution, unlike the federal system, requires a majority of the justices, that is three jus-

tices, to concur in any judgment of the court. Constitution of New Mexico, Article VI, §5. If a majority of the justices are unable to concur, the decision of the lower court stands. The opinion in this case is invalid and unconstitutional because of the participation of a biased and prejudiced judge. Without Chief Justice Oman, there is not a majority of the New Mexico Supreme Court concurring in this opinion. Therefore the jdgment of the trial court in favor of Petitioner must stand.

II

Petitioner was denied equal protection of the law, as guaranteed by the Fourteenth Amendment, by the order of the New Mexico Supreme Court which arbitrarily and capriciously applied a more stringent test of disability to this Petitioner than it applies to others similarly situated. When an appeal is afforded, the Equal Protection Clause is violated if some litigants are treated differently than others similarly situated. *Lindsey v. Normet*, 405 U.S. 56, 57 (1971). Petitioner as an individual and as a member of a class, that is victims of heart attacks, was treated differently by the New Mexico Supreme Court than other persons seeking to receive total disability insurance benefits.

The New Mexico Supreme Court held that Petitioner was not totally disabled because he is not "wholly and continuously disabled from performing the duties of *any* occupation or performing *any* work for compensation or profit for which he *is* or *may become* reasonably fitted by education, training, or experience." (Emphasis by the court.) Appendix A, infra, page 20. The New Mexico Supreme Court arbitrarily chose to apply this very strict definition of total disability to this Petitioner. Where others similarly

situated were concerned, the New Mexico Supreme Court defined total disability, under identical insurance provisions, as the inability "to do substantially all the material acts necessary to the conduct or prosecution of *his* business or occupation in substantially *his* usual and customary manner." *Bubany v. New York Life Insurance Co.*, 39 N.M. 560, 567, 51 P.2d 864 (1935). (Emphasis added.) *Sawyer v. Washington National Insurance Co.*, 78 N.M. 201, 203, 429 P.2d 901 (1967). In addition, the New Mexico Court of Appeals has decided that considering the victim's need to avoid the stress of work, a myocardial infarction does constitute a total disability. *Chavez v. City of Albuquerque*, unreported opinion filed April 13, 1976.

By its unequal treatment in applying a different definition of total disability to Petitioner, the New Mexico Supreme Court has destroyed the very purpose for which the insurance policy was procured. The court, by its unequal treatment, is requiring this Petitioner to return to work even though any work would expose him to great pain and further risk his life. To prolong Petitioner's life it is necessary that he be free from mental and physical strain. The New Mexico Supreme Court has deprived Petitioner of the insurance benefits to which he is entitled and is, in effect, requiring him to return to work in order to adequately support his family. Under the definition of total disability which the court has applied only to Petitioner, a person would have to be a helpless invalid or physical or mental "basket-case" before he would be entitled to benefits.

The New Mexico Supreme Court did not overturn its prior decisions which had defined total disability. The court has thereby singled out this Petitioner for unequal treatment.

Petitioner was also denied equal protection of the law by the refusal of the New Mexico Supreme Court to abide by the settled rule that the construction of an insurance policy most favorable to the insured will be adopted. *Aschenbrenner v. United States Fid. & G. Co.*, 292 U.S. 80, 84 (1933). *Stipich v. Metropolitan Life Ins. Co.*, 277 U.S. 311 (1927). *Fowler v. First National Life*, 71 N.M. 364, 378 P.2d 605 (1963).

III

Petitioner was deprived of his property without due process of law and was denied equal protection of the law by the refusal of the New Mexico Supreme Court to follow state law and public policy existing at the time the contract of insurance was formed between Petitioner and Respondent. The law, including judicial precedent, existing at the time and place of contract formation is as much a part of the contract as though it were expressed therein. *Farmers' & Merchants' Bank v. Federal Reserve Bank*, 262 U.S. 649, 660 (1923). *Hendrickson v. Apperson*, 245 U.S. 105, 112 (1917). This principle applies to laws whether they affect contract validity, construction or enforcement. *Farmers' & Merchants' Bank*, supra. *Jones v. Board of School Directors*, 55 N.M. 195, 198, 230 P.2d 231 (1951). The construction of a contract given by the highest court of a state must be taken as correct so far as later contracts are concerned. Their interpretation and enforcement cannot be modified by any subsequent decision altering the construction. *Louisiana v. Pilsbury*, 105 U.S. 278, 294 (1881). Rights accruing under one construction cannot be lost merely by a change of opinion in the state court. *Anderson v. Santa Anna*, 116 U.S. 356, 365 (1885). A subsequent change in interpretation can

only affect subsequent contracts. *Louisiana v. Pilsbury*, supra, at 295.

Petitioner formed a contract of life insurance with Respondent and paid substantial insurance premiums in reliance upon public policy and existing state law. It was the public policy of the state of New Mexico, at the time Petitioner entered into this contract, that a person need not be completely helpless in order to receive total disability payments. This public policy was expressed both by statute and by judicial decisions. N.M.S.A. §59-10-12 1B 1953 Comp. *Snead v. Adams Construction Co.*, 72 N.M. 94, 96-97, 380 P.2d 836 (1963). *Lozano v. Archer*, 71 N.M. 175, 180-182, 376 P.2d 963 (1962). *Bubany v. New York Life Ins. Co.*, supra. *Sawyer v. Washington National Insurance Co.*, supra.

The action of the New Mexico Supreme Court amounts to a confiscatory taking of property. Many individuals in this state have paid insurance premiums in the belief that they would receive total disability payments if they became unable to work in their usual field of employment. The New Mexico Supreme Court has in effect made the payment of premiums for total disability protection of no avail. It has authorized insurance companies to keep the insurance premium payments and to pay disability benefits only for the most extreme physical handicaps.

The public policy behind insurance for total disability has been to compensate individuals for loss of earning ability. N.M.S.A. §59-10-12.1B (1953 Comp.) Petitioner was discharged from his employment because of his inability to perform his work. He has been unable to secure any employment since that time. Considering his age and his heart condition he has virtually no chance of ever being employed

again. *Archives of Environmental Health*, Vol. 29, No. 2, at 79. This individual has lost his earning ability. The New Mexico Supreme Court has deprived him of the insurance protection to which he is entitled.

If changed social circumstances necessitated a change in the definition of total disability, that change could be brought about in several ways. It could of course be accomplished by legislative enactment. It could also be accomplished by a prospective judicial ruling. This Court has recognized that the unfairness of changing an established rule may require a court to make the new rule prospective. *Linkletter v. Walker*, 381 U.S. 618, 628 (1964). The New Mexico Supreme Court has itself recognized the unfairness of changing established rules retroactively. *Hicks v. State*, 88 N.M. 588, 594, 544 P.2d 1153 (1976). In that case the New Mexico Supreme Court abolished sovereign immunity but applied its decision only to cases arising in the future. The court made that ruling prospective because of the unfairness and hardship to the state that would otherwise occur.

The court decided that equity required that the state be permitted to plan in advance, to acquire liability insurance and to investigate claims as they occurred. In this case, the former rule established by New Mexico courts was the basis of reasonable and justifiable reliance by Petitioner. The court's retrospective repeal of the established definition of total disability works an extreme hardship on Petitioner who had trusted to its existence. This individual entered into a contract of insurance and paid his insurance premiums for years in order to have financial protection in case he became unable to work. He has become totally disabled but the New Mexico Supreme Court has deprived him of the insurance benefits to which he is undeniably entitled.

IV

The federal questions here were timely raised in Petitioner's Motion for Rehearing. Appendix E, infra, page 31. The general rule that a constitutional question is urged too late if raised for the first time upon a petition for rehearing does not apply "where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a federal right." *Great Northern Ry. v. Sunburst Co.*, 287 U.S. 358, 366 (1932). A state court's order is reviewable by this court if the federal question is presented at the first opportunity by a petition for rehearing which was denied without referring to the federal question. ***Brinkerhoff-Farris Co. v. Hill***, supra, at 678. *Missouri v.* ***Gehner***, 281 U.S. 313, 320 (1929). Petitioner invoked the protection of the federal Constitution at the first possible opportunity in his Petition for Rehearing.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should be granted to review the order of the Supreme Court of the State of New Mexico.

Respectfully Submitted:

EUGENE E. KLECAN
KLECAN & ROACH, P.A.
Klecan & Roach, P.A.
Suite 1221, 505 Marquette NW
Albuquerque, New Mexico 87101
Attorney for Petitioner

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

JESSE L. GETZ,

Plaintiff-Appellee,

vs. No. 10,653

EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

ROZIER E. SANCHEZ, *Judge*

KLECAN & ROACH
EUGENE E. KLECAN
Albuquerque, New Mexico *Attorneys for Appellee*

MODRALL, SPERLING, ROEHL, HARRIS & SISK
PETER J. ADANG
JUDY GRIMES
Albuquerque, New Mexico *Attorneys for Appellant*

OMAN, Chief Justice.

This suit was brought by plaintiff (Getz) against defendant (Equitable) to recover long-term disability benefits for claimed total disability commencing September 28, 1973. The claim was made pursuant to the disability income provisions of a group life insurance policy issued to Sandia Corporation (Sandia) by Equitable. The district court found the issues in favor of Getz and entered judgment accordingly. Equitable appealed. We reverse.

Getz was employed as a mechanical engineer by Sandia from 1956 until September 1973, when his employment was terminated. He had been notified in February 1973 that he would be one of about 800 employees whose employment would be terminated by Sandia. He thereupon applied to Sandia for disability retirement. This was denied, but his employment was extended until September 28, 1973, in order that he might qualify for partial retirement benefits. On September 23, 1974, he filed this suit in the district court and the judgment in his favor was entered on September 18, 1975.

There is no question about Getz being covered by the policy of Equitable. The question is simply whether or not he is qualified for total disability benefits thereunder. The provision of the policy, under which he must qualify for these benefits, states:

> "For the purpose of the Group Long Term Disability Income policy,
>
> "(a) an Employee shall be considered totally disabled if he is wholly and continuously unable
>
> "(i) during the first two years of any one period of disability, to perform any and every duty pertaining to his employment, and
>
> "(ii) during the remainder of such period of disability, to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience."

In order for Getz to qualify for the benefits he seeks, the parties are agreed that he must have shown he was and will be wholly and continuously unable to perform the duties of work as provided in (a)(i) and (a)(ii), supra, during the periods of disability expressly set forth therein. The findings made by the district court, which have been challenged on

this appeal and which we feel are pertinent to our decision, are:

"4. That while the Plaintiff was employed by Sandia Corporation and covered by the long-term disability policy, the Plaintiff became totally disabled within the meaning of the policy due to a coronary condition of arteriosclerosis resulting in a myocardial infarction. The coronary condition of ill being is permanent.

"5. That the Plaintiff was required to ingest certain drugs, in particular valium and nitro-glycerine to try to control the heart condition and resulting discomfort. The permanent heart condition, resulting discomfort, stress of work, and the side effects of the medication have made the Plaintiff wholly unable to do every task of his former employment and unable to be again employed.

"6. That during the first two years of the period of his disability, Jesse Getz was unable to perform any and every duty pertaining to his employment and during the remaining period of disability he is and will be unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training, or experience.

"* * *.

"8. That the Plaintiff, Jesse Getz, is totally disabled as defined in the policy and New Mexico cases and is unable to be employed without hazarding his life and health."

The evidence was that on or about October 1, 1970, Getz suffered a coronary thrombosis or myocardial infarction, and that he does have arteriosclerosis. A myocardial infarction causes some heart muscle damage, and, upon healing, leaves some scar tissue in the heart muscle. He was

hospitalized on October 1, 1970, and remained in the hospital for about three weeks. After his discharge from the hospital he remained at home until December 7, 1970. He was largely resting and recuperating, but was permitted to engage in limited physical activity. On December 7, 1970, he returned to his work, but he was limited to four hours per day. In February 1971, he was returned to the performance of the full duties of his employment. In addition, he was on a program of physical exercise, including jogging. By the middle of 1971 he was jogging a mile or more, four or five days a week.

Valium is a sedative and antidepressant. Its purpose is to relieve anxiety. Getz took this sedative about three or four times a week after he returned to work. Nitroglycerine is a medication taken to relieve a temporary coronary insufficiency. He took this only occasionally as needed to relieve chest pains or discomfort coincident with angina, which is a temporary insufficiency of the full blood flow to some part of the heart muscle. Angina, or temporary coronary insufficiency, may be brought on by physical activity or by emotional or mental stress.

In its first point relied upon for reversal, Equitable contends that the district court erred in its interpretation of "total disability." This contention is predicated very largely upon oral statements made by the district court at the close of the presentation of the evidence by the parties. However, it clearly appears from its finding of fact No. 6, supra, that the district court interpreted total disability in accordance with the above-quoted policy provision. We have often held that an oral opinion, or oral statements, do not constitute a "decision," within the meaning of N.M.R.Civ.P. 52(B)(a)(1) [§ 21-1-1(52)(B)(a)(1), N.M.S.A. 1953 (Repl. Vol. 4, 1970)], and error may not be predicated thereon. Specter v. Specter, 85 N.M. 112, 509 P.2d 879 (1973); Stone v. Stone, 79 N.M. 351, 443 P.2d 741 (1968); Fox v. Doak, 78 N.M. 743, 438 P.2d 153 (1968); Pack v. Read, 77 N.M. 76, 419 P.2d 453 (1966).

As its second point relied upon for reversal, Equitable asserts that the district court erred in finding that during the first two years of Getz' claimed disability he was unable to perform any and every duty pertaining to his employment. We must concede that the evidence on this issue, as it appears in the transcript on appeal, is not free of conflicts, is far from conclusive, and would clearly support a contrary finding. However, we are of the opinion that it does support the finding when viewed as we must view it on appeal. It is not our function to weigh the evidence or its credibility, and we will not substitute our judgment for that of the trial court as to the facts established by the evidence, so long as the findings are supported by substantial evidence. Lujan v. Merhege, 86 N.M. 26, 519 P.2d 122 (1974); Cantrell v. Lawyers Title Insurance Company, 84 N.M. 584, 506 P.2d 90 (1973); Tapia v. Panhandle Steel Erectors Company, 78 N.M. 86, 428 P.2d 625 (1967).

For its third point relied upon for reversal, Equitable claims that there is no substantial evidence to support the other essential element of disability, to wit, that Getz is wholly and continuously unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. We agree with Equitable.

In support of his position that he is wholly and continuously disabled to the extent required by this provision of the policy, Getz relies primarly upon his claim that all jobs for which he is fitted or may become reasonably fitted involve stress, and that after his retirement from Sandia he mailed to different employers approximately 100 job applications and did not secure employment.

The fact that there is stress in any job, or even in living, and the fact that he received no offer of a job in response to his applications, is no evidence of substance that he is wholly and continuously disabled from performing the duties of *any* occupation or performing *any* work for compensation or

profit for which he *is* or *may become* reasonably fitted by education, training or experience. He jogs for about a mile four or five times a week, he gardens, he fishes and he boats, and there is no evidence that he is unable to perform any of the ordinary activities of a normally sedentary life, or perform the duties of many types of employment for which he is or may become fitted.

The physicians who had treated and examined him, and who testified at trial, classified him as Class I or Class II under the functional classification and either Class A or Class B under the therapeutic classification of the American Heart Association Classifications for heart patients. These classifications are:

> "Class I. Patients with cardiac disease but without resulting limitations of physical activity. Ordinary physical activity does not cause undue fatigue, palpitation, dyspnea, or anginal pain.
>
> "Class II. Patients with cardiac disease resulting in slight limitation of physical activity. They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea, or anginal pain.
>
> "Class A. Patients with cardiac disease whose physical activity need not be restricted in any way.
>
> "Class B. Patients with cardiac disease whose ordinary physical activity need not be restricted, but who should be advised against severe or competitive efforts."

Both physicians who testified on behalf of Getz stated there were certain types of employment which he could perform. His treating physician named drafting and technical writing as two forms of employment in which he could en-

gage. The other doctor made the general statement that Getz could perform light and sedentary types of work. Work as a mechanical engineer was repeatedly referred to by witnesses as being sedentary. There is evidence that Getz' duties in engineering design did involve some stress, perhaps more than at least some other employments in the field of mechanical engineering. His employment also required occasional lifting of heavy equipment for which he would seek assistance, since his doctor advised he should not lift heavy objects. However, because his particular duties caused him some discomfort and distress three or four times a week and involved occasional physical activity which he could not perform alone, it does not follow that he is wholly and continuously disabled from performing the duties of any occupation or performing any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. There was undisputed testimony from a vocational analyst concerning many types of employment which Getz could do, and his treating physician testified he would be better off psychologically if he did work.

Although it is not proper for us to disagree with a finding supported by substantial evidence, we can and must determine whether the evidence presented substantially supports a finding which has been properly attacked. Tyner v. DiPaolo, 76 N.M. 483, 416 P.2d 150 (1966). Findings not supported by substantial evidence, and which have been properly attacked, cannot be sustained on appeal, and a judgment dependent thereon must be reversed. Cantrell v. Lawyers Title Insurance Company, supra; Forrest Currell Lumber Company v. Thomas, 81 N.M. 161, 464 P.2d 891 (1970); Herrell v. Piner, 78 N.M. 664, 437 P.2d 125 (1968).

We have read the transcript on appeal in this case and are convinced that there is no substantial evidence to support the finding of the district court that Getz "is and will be unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience." Since this finding is essential to the judgment entered in favor of Getz, that judgment cannot stand.

The final point relied upon by Equitable relates to claimed errors in the computation of disability benefits. This point is of no significance and need not be considered by us, since the judgment is being reversed for the reason above stated.

The judgment of the district court is reversed, and this cause is remanded to that court with directions to enter judgment for Equitable.

IT IS SO ORDERED.

LaFel E. Oman
Chief Justice

WE CONCUR:

John B. McManus, Jr., J.
H. Vern Payne, J.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

Wednesday, March 23, 1977

No. 10,653

JESSE L. GETZ,

Plaintiff-Appellee,

vs. Bernalillo County

EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellant for a rehearing, and the Court having considered said motion and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that motion for Rehearing be and the same is hereby denied.

ATTEST: A TRUE COPY

ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
IN THE DISTRICT COURT

JESSE L. GETZ,

Plaintiff,

vs. No. 9-74-15395

EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Defendant.

COURTS FINDINGS OF FACT
AND CONCLUSIONS OF LAW

After hearing the testimony of the witnesses and considering the evidence presented at the trial of the above cause, and having considered the argument of counsel, the Court makes the following

FINDINGS OF FACT

The Court finds, as a matter of fact:

1. That the Court has jurisdiction of the parties and the cause of action.

2. That Jesse L. Getz at all times material herein was employed at Sandia Corporation.

3. That the Plaintiff at all times material herein was covered by the Equitable Life Assurance Society of the United States group policy for long-term disability for which he paid premiums.

4. That while the Plaintiff was employed by Sandia Corporation and covered by the long-term disability policy, the Plaintiff became totally disabled within the meaning of the policy due to a coronary condition of arteriosclerosis resulting in a myocardial infarction. The coronary condition of ill being is permanent.

5. That the Plaintiff was required to ingest certain drugs, in particular valium and nitroglycerine to try to control the heart condition and resulting discomfort. The permanent heart condition, resulting discomfort, stress of work, and the side effects of the medication have made the Plaintiff wholly unable to do every task of his former employment and unable to be again employed.

6. That during the first two years of the period of his disability, Jesse Getz was unable to perform any and every duty pertaining to his employment and during the remaining period of disability he is and will be unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training, or experience.

7. That during his period of disability Jesse Getz has been under the regular care and attendance of a legally qualified physician and will continue to be under such care during the remaining period of his disability.

8. That the Plaintiff, Jesse Getz is totally disabled as defined in the policy and New Mexico cases and is unable to be employed without hazarding his life and health.

9. That the Plaintiff has complied with all conditions precedent in presenting the claim for disability.

10. Policy payments were due commencing September 28, 1973.

11. That at the time of the disability his income was $1,466.67 per month.

12. That the policy provides that he is entitled to one-half of that income per month less the deduction for Social Security disability benefits. None of the other deductions in the policy are applicable or supported by the evidence.

13. That the Social Security benefits commenced on March 1, 1974, in the amount of $292.00 per month until July 1, 1974. From July 1, 1974, until July 1, 1975, the amount of the Social Security benefits were $306.90 per month. From July 1, 1975, onward the amount of benefits is $331.50 per month.

14. That the Plaintiff, Jesse L. Getz, is entitled to:

50% of monthly income = $733.34

September 28, 1973 to February 28, 1974:	
5 month at $733.34 per month	$3,666.70
March 1, 1974 to June 30, 1974:	
$773.34	
-292.00 Social Security	
$441.34	
4 months at $441.34 per month	1,765.36
July 1, 1974 to June 30, 1975:	
$733.34	
-306.90 Social Security	
$426.44	
12 months at $426.44 per month	5,117.28
July 1, 1975 to July 30, 1975:	
$733.34	
-331.50 Social Security	
$401.84	
1 month at $401.84 per month	401.84
Total due from September 28, 1973 to July 30, 1974 (*not* including interest)	$10,951.18

Interest is due at 6% per year from September 28, 1973, until judgment is paid.

October 1, 1973 to September 30, 1974:

10/1/73 to 2/28/74 = (5 mos. at $733.34 mo.)	= $3,666.70
3/1/74 to 6/30/74 = (4 mos. at $441.34 mo.)	= 1,765.36
7/1/74 to 9/30/74 = (3 mos. at $426.44 mo.)	= 1,279.32
	$6,711.38
$6,711.38 (1 year at 6% per year)	= $ 402.68

October 1, 1974 to July 30, 1975:

10 months = 5/6 of a year

10/1/74 to 6/30/75 = (9 mos. at $426.44 mo.)	= $3,837.96
7/1/75 to 7/30/75 = (1 mo. at $401.84 mo.)	= 401.84
	$4,239.80
$4.239.80 (5/6 year at 6% per year)	= $ 211.99
Interest due 9/28/73 to 7/30/75	= $ 402.68
	+211.99
	$ 614.67

Total amount due 9/28/73 to 7/30/75:

On Contract	$10,951.18
Interest	614.67
	$11,565.85

14. That the Plaintiff paid premiums for the insurance benefits and that the Plaintiff is entitled to the insurance benefits because he is totally disabled within the meaning of the policy.

CONCLUSIONS OF LAW

The Court concludes, as a matter of law:

1. That the Court has jurisdiction of the parties and the subject matter.

2. That all conditions precedent to presenting the claim have been fulfilled and the Plaintiff has complied with the provisions of the policy.

3. That the Plaintiff is totally disabled within the terms of the policy and is entitled to the benefits thereof.

4. That the Plaintiff is entitled to $11,565.85 and to monthly payments of $401.84.

All requested Findings and Conclusions inconsistent with the foregoing are hereby denied.

ROZIER E. SANCHEZ
District Judge, Div. X
Second Judicial District

APPENDIX D

STATE OF NEW MEXICO
COUNTY OF BERNALILLO

IN THE DISTRICT COURT

JESSE L. GETZ,

Plaintiff,

vs. No. 9-74-15395

EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Defendant.

Judgment

The matter having come before the Court for a hearing on the merits, the Plaintiff having been present and represented by counsel, the Defendant having been represented by counsel, each side having presented testimony through witnesses and exhibits, the Court having heard all the testimony, and the arguments of counsel, the Court made its Findings of Fact and Conclusions of Law. The Court having found in favor of the Plaintiff, JESSE L. GETZ, and against the Defendant, EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

IT IS HEREBY ORDERED that Judgment is entered in favor of the Plaintiff, Jesse L. Getz, and against the Defendant, EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, in accordance with the Findings of Fact and Conclusions of Law previously filed.

IT IS FURTHER ORDERED that the Plaintiff is to recover costs.

ROZIER E. SANCHEZ,
District Judge

APPENDIX E

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

JESSE L. GETZ,

Plaintiff-Appellee,

vs. No. 10,653

EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Defendant-Appellant.

MOTION FOR REHEARING

The fundamental error we assert in the opinion is the promulgation of a doctrine of "total disability" at variance with all existing national and state standards including New Mexico. The opinion as a legal predicate indicates a lack of substantial evidence to support a finding (Opinion, p. 6). However the basic error is the establishment for this case of a standard defining total disability. In other words, if the court's extreme and outmoded acceptance of total disability is accepted, the trial court is in effect being over-ruled because the trial court applied existing New Mexico case law to the definition of "total disability" (Tr. 44, finding 8). The opinion does not state that it is overturning existing case law existing since 1935 and does not cite a single case in support of its complete reversal of New Mexico law. Therefore the conclusion that there is a lack of substantial evidence is a conclusion of the opinion as applied to the opinion's own definition of total disability. The trial court interpreted the evidence in light of its acceptance and application of existing New Mexico law on total disability. Therefore it is, we submit, incorrect to say that the court found for the plaintiff as to total disability since the opinion says "there is no substantial evidence to support the finding of

the district court". Mr. Getz filed his case, tried his case, the trial court heard the case and ruled on the basis of a definition of total disability which the opinion has now rejected as a legal principle. As a conclusion on the above this plaintiff has been denied the equal protection of the law and due process in violation of the 14th Amendment to the Constitution. From 1935 until this opinion workers, and Mr. Getz is a worker and it is a worker's policy, have had total disability evaluated in conformity with existing New Mexico law. This has been changed and since it is not stated that the law on total disability has now been changed in its most fundamental means and changed in a way adverse to the worker, we have the effect, we submit, of this plaintiff being denied the equal protection of the law and due process in violation of the Constitution of the United States 14th Amendment and what is even more important in violation of the due process clause of the State of New Mexico for Mr. Getz is a citizen of this state. If we accept the opinion's reversal of New Mexico law which is in opposition not only to prior existing law of this state but also existing laws of the United States of America and other states on the definition of total disability it may well be true that the evidence in this case may not be substantial to measure up to the almost complete exclusionary definition adopted by the opinion.

Since this was a contract for which Mr. Getz paid his own money and since at the time of the contract it was universally accepted based on Supreme Court decisions that a total disability meant something radically different from what this court now holds, that there has been not only errors in law but errors in fundamental constitutional rights including impairment of the obligation of contract and changing a standard after parties had taken positions consistent with prior adjudications from this court is violation of due process, equal protection of the laws, and impairment of obligation of contract under the Constitution of the United States and the State of New Mexico. It is public policy in New Mexico as contained in the Workmen's Compensation Act that total disability does not have in any sense of the term the exclusionary and far-reaching restrictions

of the definition and doctrine imposed upon a worker to prove a total disability. That the fact that this is a private contract does not remove it from the public policy of this state to permit a worker to recover on a contract for which the definition total disability has been changed by a decision which has been now made retroactive to a physical condition existing prior to the promulgation of this opinion. That the error in the opinion is not the lack of substantial evidence to prove a case. The error in the opinion is the imposition of a definition of total disability which is so extreme as to be out of conformity not only with existing law but with the whole course of humanitarian legislation and court decisions for many decades.

Bubany v. New York Life Insurance Company, 39 N.M. 560, 51 P.2d 864 (1935), and *Sawyer v. Washington National Insurance Company*, 78 N.M. 391, 429 P.2d 901 (1967), are directly contradicted by the opinion in the case at bar. The complete rejection of all modern law on "labor" and "disability" takes place in the opinion at page 5, lines 1-4 and is lighted up for emphasis by underlining the word "*any*" twice and underlining the two words "*may become*". The sentence which does away with New Mexico law and all modern law and the public policy of all states and the United States (Bubany, supra, and 77 A.L.R. 2d 642) is contained in the literal acceptance of the principle that a total disability means "he is wholly and continuously disabled from performing *any* work for compensation or profit for which he is or *may become* reasonably fitted by education, training or experience." Underlining supplied by the Court in the opinion. It is significant that from the above option quote, the opinion commences to apply the evidence to the above legal definition. If the above labor shattering definition of total disability is accepted, the most fundamental error in the opinion has been disregarded (Rule 19).

The opinion commences to further overrule all existing law by illustrating a worker's incapacity in terms of mere physical function and not in terms of job capacity. Opinion

page 5, lines 4-8 say, "He jogs for about a mile four or five times a week, he gardens, he fishes and he boats, and there is no evidence that he is unable to perform any of the ordinary activities of a normally sedentary life, or perform the duties of many types of employment for which he is or may become fitted." The policy by its very terms is "disability" to "work".

The standard thus imposed by the opinion became the fundamental error. What the opinion established is what might be called the "physical function" test. By physical function is meant if he is not restricted in walking or getting in and out of a boat and if he can get around as a "sedentary" individual he is not disabled. The opinion would require that Mr. Getz prove "that he is unable to perform *any* of the ordinary activities of a normally sedentary life" (see opinion).

The above is the author's standard for recovery. How are the ordinary activities of a normally *sedentary* life and life of voluntary retirement related to a disability to work? The opinion overlooks the very nature of the Policy and the Insured. The policy is "disability to work" not normal functions of an old retired person. Not a single case cited is in support of this far-reaching doctrine of judging a total disability on the basis of a voluntary retired individual to whom a recovery on a policy would be denied unless there was some permanent condition which would render him immobile.

The opinion states at page 4, lines 31 and 32: "The fact that he received no offer of a job in response to his applications, is no evidence of substance that he is wholly and continuously disabled" and thus the evidence on the non-availabality of jobs. This is not in keeping with any modern law on disability. See for instance public policy of the United States on the Social Secuirty Act, 77 A.L.R. 2d 641. *Gardner v. Brion*, C.A. 10, Okla. 369 F.2d 443. In citing some of the evidence the court overlooks one very important item of evidence and finding by the court, namely

that the plaintiff is totally disabled as defined in the policy *and New Mexico cases* (Tr. 44).

The trial judge applied New Mexico law as he expressly stated therein. The opinion overlooks this point which was also brought out in the brief and the opinion goes on to adopt a definition of total disability. The opinion has thus overruled the trial judge on a point of law and not fact.

The opinion fails completely to mention the worker's most significant evidentiary matters and findings of fact as for example Finding 5 and 6 which said "The plaintiff is wholly unable to do every task of his former employment and unable to be again employed." (Tr. 44). The opinion by disregarding the above has usurped the trial court's function to decide the facts.

The newly imposed definition of a total disability would in effect make a recovery against the insurance company an impossibility except for perhaps an individual totally incapacitated in a physical sense. As illustrative of the complete accuracy of the above, reference is made to the opinion page 6 wherein we find the following language:

> "However, because his particular duties caused him some discomfort and distress three or four times a week and involved occasional physical activity which he could not perform alone, it does not follow that he is wholly and continuously disabled from performing the duties of any occupation or performing any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience."

In addition a strong significant element was introduced into the case at oral argument on June 23, 1976 at which time the Chief Justice remarked that perhaps he should not sit on the case because he had sustained several heart attacks himself and had continued to work and words were used to the effect that there constituted a personal opinion that continued work after a heart attack was something to be said against a heart attack being disabling. In any event the

voiced comments were not in tone or essence favorable to the plaintiff's position.

Mr. Getz and his doctor did testify about "pressure on the job" as actual symptom of heart problem and a threat to future life and well being and was a factor in the plaintiff not being able to work. The subjective opposition from the bench, although more courageous from a personal viewpoint, is we submit a subjective factor calling for a rehearing as being in opposition to a due process appeal, and equal protection of the law. Someone who had not had a number of heart attacks would certainly not be such a subjective factor.

Unfortunately the tape of oral argument when requested for confirmation on March 18, 1977, was blank when attempted to be played by the Clerk of the Supreme Court in her office. Justice Montoya and acting Judge Payne, then a District Judge, formed the panel. The absence of Justice Montoya, the elapse of a long period of time from oral argument, the retirement of the Chief Justice prior to the opinion, the new position of Justice Payne, the inherent reasons in the opinion itself props us to raise the question that the procedures and the changed composition of the panel is not in conformity with existing law, and a majority of the court being required, and the above reasons, individually and collectively constitute a deprivation of constitutional guarantees assured to all citizens under the Federal and State Constitutions.

WHEREFORE, movant requests a rehearing. Brief will be supplied forthwith; that is within 48 hours.

Respectfully submitted,

KLECAN & ROACH, P.A.
EUGENE E. KLECAN
Attorneys for Plaintiff-Appellee
Suite 1221 - 505 Marquette Ave. N.W.
Albuquerque, New Mexico 87101
Telephone: (505) 243-7731, 243-4419

Supreme Court, U. S.
FILED
JUL 22 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1806

JESSE L. GETZ,

Petitioner

VS.

EQUITABLE LIFE ASSURANCE SOCIETY
OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

MODRALL, SPERLING, ROEHL, HARRIS
AND SISK
Peter J. Adang
800 Public Service Building
P.O. Box 2168
Albuquerque, New Mexico 87103
Attorney for Respondent

INDEX

	Page
TABLE OF AUTHORITIES	ii-iv
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2-6
ARGUMENT	6-15
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: *Page*

Anaya vs. Scarborough,
75 N.M. 702, 410 P.2d 732 (1966) 8

In Re Bishop's Estate,
250 F. 145 (9th Cir. 1918) 8

Bubany vs. New York Life Ins. Co.,
39 N.M. 560, 51 P. 2d 864 (1935) 10

Cole vs. Loew's, Inc.,
76 F. Supp. 872 (S.D. Cal. 1948) 8

Continental Cas. Co. vs. Davidson,
463 S.W. 2d 652 (Ark. 1971) 10

Edwardsen vs. State,
220 A.2d 547 (Md. 1966) 8

Evans vs. Gore,
253 U.S. 245, 40 S.Ct. 550 (1920) 8

Evans vs. Superior Court,
290 P. 552 (Cal 1930) 8

Fry Roofing Co. vs. Wood,
344 U.S. 157, 73 S. Ct. 250 (1952) 11

Grayson vs. Harris,
267 U.S. 352, 45 S. Ct. 317 (1925) 11

Gutierrez vs. Middle Rio Grande Conservancy District,
34 N.M. 346, 292 P.1 (1929) 7

Haslam vs. Morrison,
190 P.2d 520 (Utah 1948) 8

In Re Heirich,
140 N.E.2d 825 (Ill. 1957) 8

Hudspeth vs. State,
67 S.W.2d 191 (Ark. 1933) 8

Hughes vs. Black,
160 A.2d 113 (Md. 1960) 8

Kubat vs. Kubat,
258 P.2d 897 (Colo.) 8

Lainum vs. Continenetal Cas. Co.,
469 P.2d 964 (Wash. 1970) 10

Lindsey-Strathmore Irrigation Dist. vs. Superior Court,
187 P. 1056 (Cal. 1920) 8

Midwest Royalties, Inc. vs. Simmons,
61 N.M. 399, 301 P.2d 334 (1956) 7

Mitchell vs. Sage Stores Co.,
143 P.2d 652 (Kan. 1943) 8

Osborne vs. Chinn,
121 S.E. 2d 610 (W. Va.) 8

Portland Ry. Co. vs. Railroad Comm.,
229 U.S. 397, 33 S. Ct. 820 (1913) 11

Prudence Life Ins. Co. vs. Wooley,
182 So. 2d 393 (Miss. 1966) 10

Rogers vs. Mutual Life Ins. Co.,
122 S.W. 2d 5 (Mo. 1938) 10

Sawyer vs. Washington Nat'l Life Ins. Co.,
78 N.M. 201, 421 P.2d 901 (1967) 10

Slocum vs. Simms,
5 Cranch 363, 3 L.Ed. 125 (1809) 8

State vs. Waterman,
210 P. 208 (Idaho 1922) 8

Stoner vs. New York Life Ins. Co.,
311 U.S. 464, 60 S.Ct. 336 (1940) 11

Stout vs. Central Nat'l Life Ins. Co.,
522 S.W.2d 124 (Mo. 1975) 10

Tatum vs. Southern Pacific Co.,
58 Cal. Rptr. 237 (Cal.) 8

Tharp vs. Massengill,
38 N.M. 58, 28 P.2d 502 (1933) 7

U.S. vs. 16,000 Acres of Land
49 F.Supp. 872 (S.D. Cal. 1948) 8

U.S. vs. Johnston
268 U.S. 220, 45 S.Ct. 496 (1925) 11

World Ins. Co. vs. Hall
384 F.2d 138 (5th Cir. 1967) 12

FEDERAL STATUTES:
28 U.S.C. §1257(3) . . . . . .

CONSTITUTIONAL PROVISIONS:
Constitution of New Mexico, Article VI, Section 18 2

MISCELLANEOUS:
§59-10-12.18 N.M.S.A. (1953 Comp.) 14

IN THE

Supreme Court of the United States

October Term, 1976

No. . . . . .

JESSE L. GETZ

Petitioner,

VS.

EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

The Equitable Life Assurance Society of The United States, hereinafter referred to as the "Respondent", prays that the Petition for Writ of Certiorari to review a final order of the Supreme Court of the State of New Mexico, entered on March 11, 1977, be denied.

OPINION BELOW

The opinion of the Supreme Court of New Mexico is reported in the State Bar of New Mexico Bulletin, Vol. 16, No. 5, at 1736. The opinion appears at Appendix A of the Petition.

JURISDICTION

The final order of the New Mexico Supreme Court was made and entered in March 11, 1977. The order denying Petition for Rehearing was entered on March 23, 1977. That order appears at Appendix B of the Petition.

QUESTIONS PRESENTED

1. Whether Petitioner has demonstrated that the Chief Justice of the New Mexico Supreme Court had such an "interest" in the litigation as to disqualify him from participation.

2. Whether Petitioner waived or otherwise failed to timely exercise any right he may have had to disqualify the Chief Justice of the New Mexico Supreme Court.

3. Whether this case involved any question of Federal constitutional law.

4. Whether this case was decided primarily upon a question of fact.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of New Mexico, Article VI, Section 18:

"Sec. 18 [Disqualification of judges.]

"No justice, judge or magistrate of any court shall, except by consent of all parties, sit in any cause in which either of the parties are related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest. (As amended November 8, 1966)."

STATEMENT OF THE CASE

Jesse L. Getz, hereinafter referred to as the "Petitioner", was 56 years old at the time of trial. (Tr. 140). He was a mechanical engineer by education and profession and had worked for his employer, Sandia Corporation, in Albuquerque, New Mexico, from November 1956 through September 1973. (Tr. 140-141). From about 1967 or 1968, he worked specifically as a design engineer within the

mechanical engineering community. (Tr. 144). While employed at Sandia Corporation, Petitioner was insured under a group long-term disability policy issued to employees of the corporation by the Respondent. Under the policy in question, insured members of the group were entitled to benefits if totally disabled. In this context, total disability was defined as follows:

"For the purpose of this policy,

(a) an employee shall be considered totally disabled if he is wholly and continuously unable

(i) during the first two years of any one period of disability to perform any and every duty pertaining to his employment, and

(ii) during the remainder of such period of disability, to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience."

In October 1970, while insured under the above-mentioned policy, Petitioner suffered a myocardial infarction secondary to arteriosclerosis. (Tr. 52-53). In December 1970, after a period of treatment and recuperation, the Petitioner, on his physician's advice, returned to his regular job on a part-time basis. (Tr. 64, 150). In February 1971, he was released to full-time work without any restrictions or limitations. (Ibid.). From February 1971 until the fall of 1972, the Petitioner worked at his regular occupation. During that period of time, he was not under the care of any physician; he saw no physicians; he worked without complaint or visible limitation; and, he had no excessive absenteeism. (Tr. 270). For all intents and purposes, he had completely recovered from his heart attack.

In the fall of 1972, Petitioner heard a rumor at Sandia Corporation of an impending general layoff. (Tr.272). He became worried about his job and went to see the company physician in November, at which time he voiced his fears about losing his job. (Ibid.). Significantly, he made no mention of his heart condition, or of any problem with his heart, or his ability to perform the work. (Tr. 273). The company physician made an appointment for him with the company psychologist, but Petitioner failed to keep the appointment.

Petitioner continued to work at his regular employment thereafter. In February 1973, he was notified that he would be laid off

as part of a general layoff of Sandia Corporation employees. (Tr. 277). The people laid off were generally the least productive. The Petitioner's work production had never been very high, even before his heart attack. (Tr. 313). His evaluations by supervisors both before and after the heart attack showed that his productivity was about the same. (Tr. 241, 250, 309). Upon receipt of the notice of layoff, the Petitioner immediately filed a claim for disability retirement under Sandia Corporation's retirement plan. (Tr. 282). The application was investigated by Sandia's medical staff and a report was made to the the retirement committee. In the judgement of the medical staff, Petitioner was not totally disabled from doing the work of a design engineer. (Ibid.). As a consequence, the application for disability retirement was rejected by the retirement committee. (Tr. 284). However, Sandia Corporation did allow the Petitioner to remain on its payroll until September 1973, in order to qualify for early retirement benefits. Petitioner testified that, had he not been laid off, he would have continued to work for three and one-half years in order to qualify for full retirement benefits. (Tr. 278).

After he took early retirement in September 1973, the Petitioner filed a claim with the Respondent for benefits under the long-term disability policy on the ground that, in September 1973, he was totally disabled from performing his duties as a consequence of the 1970 heart attack.

Prior to trial, the Petitioner was examined and evaluated by four physicians, one of whom had been his treating physician in 1970. There was no evidence that his physical condition had changed from February 1971 until the time of the trial. Electrocardiograms taken in 1971, as compared with 1975, were stable and showed no change. (Tr.84). Petitioner's physical findings from February 1971 to the time of trial were identical. (Tr. 103-04). None of the physicians who examined the Petitioner found or observed any of the symptoms of which the Petitioner complained. (Ibid.). All of the physicians classified the Petitioner as a Class IA or Class IIB heart patient according to the American Heart Association Classification of Heart Patients. These classifications were:

"Class I. Patients with cardiac disease but without resulting limitations of physical activity. Ordinary physical activity does not cause undue fatigue, palpitation,

dyspnea, or anginal pain.

"Class II. Patients with cardiac disease resulting in slight limitation of physical activity. They are comfortable at rest. Ordinary physical activity results in fatigue, palpitation, dyspnea, or anginal pain.

"Class A. Patients with cardiac disease whose physical activity need not be restricted in any way.

"Class B. Patients with cardiac disease whose ordinary physical activity need not be restricted, but who should be advised against severe or competitive efforts."

Testimony at the trial from physicians established that the Petitioner could, at that time, perform the tasks of a mechanical engineer. (Tr. 106). His treating physician testified that it would be psychologically better for the Petitioner if he were to continue working. (Tr. 115). Disinterested witnesses testified that the job of a mechanical engineer is light and sedentary, and not particularly stressful. (Tr. 240, 311-12). A vocational expert analyzed the educational background of a mechanical engineer, the job requirements and the medical testimony, and concluded that the Petitioner was capable of performing the tasks of a mechanical engineer on a regular basis. (Tr. 327). He further testified that even if the Petitioner could not do the job of a mechanical engineer, there were numerous other occupations in which he could engage by using his existing educational background and work skills. (Tr. 329).

Based upon the evidence presented at the trial, the New Mexico Supreme Court held that findings of fact of the trial court that the Petitioner was totally disabled under the definitions in Respondent's long-term disability policy were not supported by substantial evidence. It stated:

> "Although it is not proper for us to disagree with a finding supported by substantial evidence, we can and must determine whether the evidence presented substantially supports a finding which has been properly attacked. Findings not supported by substantial evidence, and which have been properly attacked, cannot be sustained on appeal, and a judgment dependent thereon must be reversed....

"We have read the transcript on appeal in this case and are convinced that there is no substantial evidence to support the finding of the district court that Getz is and will be unable to engage in any occupation or perform any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience.' Since this finding is essential to the judgment entered in favor of Getz, that judgment cannot stand."

The Respondent's appeal from the judgment of the trial court was heard by a three-judge panel in the New Mexico Supreme Court, one of whom was Chief Justice LaFel E. Oman, now retired. There is no record of any remarks allegedly made by the Chief Justice during the course of oral arguments and Respondent disputes the narration of statements allegedly attributed to the Chief Justice by the Petitioner. Oral argument was conducted before the Supreme Court on June 23, 1976. The decision of the Supreme Court was rendered on March 11, 1977. At no time did the Petitioner move to have the Chief Justice recuse himself from the matter; or, otherwise attempt to disqualify the Chief Justice.

ARGUMENT

I.

Petitioner's first point for granting the Petition is that Chief Justice Oman of the New Mexico Supreme Court was biased or interested in the matter and that he was, therefore, deprived of a fair hearing. The argument is predicated entirely upon statements allegedly made by the Chief Justice during the course of oral argument on appeal. There is no record of the alleged statements and Respondent disputes the Petitioner's assertion that they were made. In the absence of any record upon which this Court can rely to substantiate the Petitioner's claims, the Petition should be denied.

If the remarks attributed to Chief Justice Oman by the Petitioner were, in fact, made, it would seem that the Petitioner would have done something immediately to preserve his rights or at least make a record of what occurred. He could have immediately requested a record; or, he could have requested that the Chief Justice recuse himself; or he could have filed a motion to disqualify the Chief Justice. Yet, he did none of these things. His statement that he

"presumed" that the Chief Justice would not participate in the decision is hollow and unconvincing. Petitioner's inaction belies his claim that alleged comments of the Chief Justice during the course of oral argument were as he has paraphrased them.

In addition to the foregoing, even if the remarks, as alleged, were made, the Petitioner failed to properly preserve his rights. Petitioner's argument is that, under Article VI, Section 18, of the Constitution of New Mexico, a justice may not participate in any case "in which he has an interest." The contention apparently is that Chief Justice Oman demonstrated an "interest" in the outcome of this litigation and could not participate in the decision. By his doing so, the Petitioner was denied due process and the equal protection of the laws of the State of New Mexico.

Petitioner's argument is interesting but it ignores the fact that the New Mexico constitutional provision is not automatic or self-executing. It has been consistently held in New Mexico that Article VI, Section 18, does not contain an absolute disqualification, but only confers a right upon litigants which they must exercise or waive. *Midwest Royalties, Inc, vs. Simmons,* 61 N.M. 399, 301 P.2d 334 (1956); *Gutierrez vs. Middle Rio Grande Conservancy District,* 34 N.M. 346, 292 P.1 (1929). If a litigant chooses to avail himself of the constitutional right he is required to file some motion or other appropriate pleading calling the ground for disqualification to the court's attention and demanding a ruling thereon. See, *Tharp vs. Massengill,* 38 N.M. 58, 28 P.2d 502 (1933). In this case, as stated above, the Petitioner made no effort, at the time Chief Justice Oman allegedly made the remarks attributed to him, to affirmatively disqualify the Justice; nor, did he file any pleading within a reasonable time thereafter calling the Supreme Court's attention to the claimed ground for disqualification. Oral argument was held on June 23, 1976, and the Supreme Court rendered its decision reversing the trial court on March 11, 1977, almost ten months later. Petitioner rested on whatever rights he had for that period of time and made no attempt to assert them until after the decision reversing a trial court judgment in his favor had been made. It is obvious that the Petitioner was content with the situation as long as he felt that the decision was going to be in his favor; and, that he has attempted to belatedly assert a claimed right only because his expectations were not

realized. However, under the plain language of the New Mexico constitutional provision, as well as the interpretations therof by the New Mexico Supreme Court, Petitioner's conduct constituted a waiver of any right to have the Chief Justice disqualified.

Finally, even if it is assumed that Chief Justice Oman made remarks exactly as alleged by the Petitioner, such remarks do not demonstrate an "interest" or "bias" that would be sufficient to disqualify him. It is well established that a judge is disqualified from acting in a case in which he has an "interest". *Evans vs. Gore,* 253 U.S. 245, 40 S.Ct. 550 (1920); *Slocum vs. Simms,* 5 Cranch 363, 3 L.Ed. 126 (1809). The prevailing view is that the disqualifying "interest" must be pecuniary or proprietary in nature. *In Re Bishop's Estate,* 250 F. 145 (9th Cir. 1918); *Lindsay-Strathmore Irrigation Dist. vs. Superior Court,* 187 P. 1056 (Cal. 1920): *Tatum vs. Southern Pacific Co.,* 58 Cal. Rptr. 237 (Cal.); *Kubat vs. Kubat,* 258 P.2d 897 (Colo); *In Re Heirich,* 140 N.E.2d 825 (Ill. 1957), cert, den., 355 U.S. 805, 78 S.Ct. 22 (1957); *Edwardsen vs. State,* 220 A.2d 547 (Md. 1966); *Hughes vs. Black,* 160 A.2d 113 (Md. 1960); *State ex rel Osborne vs. Chinn,* 121 S.E.2d 610 (W. Va.). In New Mexico, an "interest" sufficient to disqualify may also be an actual bias or prejudice. *State ex rel. Anaya vs. Scarborough,* 75 N.M. 702, 410 P.2d 732 (1966). The words "bias" or prejudice" refer to the mental attitude of the judge toward a party to the litigation and not to any views that he may entertain regarding the subject matter involved. *Cole vs. Loew's, Inc.,* 76 F.Supp. 872 (S.D. Cal. 1948); *U.S. vs. 16,000 Acres of Land,* 49 F.Supp. 645 (D. Kan. 1943); *Hudspeth vs. State,* 67 S.W.2d 191 (Ark. 1933), cert. den., 296 U.S. 642, 56 S.Ct. 178 (1935). See, also, *Evans vs. Superior Court,* 290 P. 552 (Cal, 1930); *State vs. Waterman,* 210 P. 208 (Idaho 1922); *State ex rel. Mitchell vs. Sage Stores Co.,* 143 P.2d 652 (Kan. 1943), aff'd., 323 U.S. 32, 65 S.Ct. 9 (1944). "Bias" and "prejudice" mean a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward another. *Haslam vs. Morrison,* 190 P.2d 520 (Utah 1948). The fact that a judge may have an opinion as to the merits of the case or that he has strong feelings about the type of litigation involved does not make him biased or prejudiced. (Ibid.).

The Petitioner has not demonstrated that Chief Justice Oman had any pecuniary or proprietary interest in the subject matter of this

litigation; nor, has he shown any bias or prejudice in the sense of hostility or ill will toward the Petitioner personally. The language attributed to Chief Justice Oman, if it was uttered, shows at most that he had certain views concerning the subject matter of the litigation (viz., the capacity of a person who has suffered a heart attack). This was not sufficient to disqualify the justice from hearing the matter and does not establish that the Petitioner was deprived of due process or equal protection of the law. Since Chief Justice Oman was not, therefore, disqualified from acting in this matter, a majority of the justices of the new Mexico Supreme Court did decide the case in favor of the Respondent and the decision was proper in all respects.

II.

Petitioner's second point for granting the Petition for Writ or Certiorari is that the New Mexico Supreme Court in some manner changed New Mexico law and that, in so doing, treated the Petitioner differently from others similarly situated, thereby denying him equal protection of the law. It is contended that the consequence of this is that Petitioner is required to "return to work even though any work would expose him to great pain and further risk his life." "To prolong Petitioner's life it is necessary that he be free from mental and physical strain." The narration goes on that Petitioner is required to return to work to "adequately support his family." None of these arguments is supported by any transcript references and, as a matter of fact, they are untrue. Most people's lives would probably be prolonged if they were free from physical and mental strain. But, the fact that one's lifespan may be less because of the stresses and strains of daily living does not establish total disability under an insurance policy. Petitioner's own treating physician testified at the trial that it would be better for the Petitioner if he did return to work. And, all of the expert witnesses testified that he was capable of working. The implication that Petitioner cannot now "adequately support his family" is specious since there was evidence at the trial that Petitioner has no children living at home; that he is collecting early retirement benefits, from Sandia Corporation, as well as Social Security benefits; and, that his wife is a school teacher. He is apparently affluent enough to own a boat and spend his time fishing.

Furthermore, the new Mexico Supreme Court did not disregard its prior decisions in deciding Petitioner's case. The only two New Mexico cases involving long-term disability policies were *Bubany vs. New York Life Ins. Co.*, 39 N.M. 560, 51 P.2d 864 (1935); and, *Sawyer vs. Washington Nat'l Life Ins. Co.*, 78 N.M. 201, 421 P.2d 901 (1967). Both of these cases were briefed, discussed and argued in the trial court and before the New Mexico Supreme Court. Neither case involved a total disability provision which was "identical" to that of the Respondent in the instant case. And, neither case had facts similar to the instant case. It is obvious that the New Mexico Supreme Court did not consider either case to be controlling and rejected them as authority in the instant case. It did not, and had no reason to, overrule either of these decisions.

The foregoing illustrates Respondent's position that there is no substantial Federal question involved in this case. Petitioner has not specified any particular Federal question involved, nor has he cited any article, clause or amendment of the United States Constitution that was violated. It is evident from the arguments made by Petitioner under Point II that this case involves an interpretation of New Mexico law; and, certain findings of fact from the evidence. It is respectfully submitted that, in the interpretation of New Mexico law, the judgment of the New Mexico Supreme Court is superior and paramount. It is not within the jurisdiction of this Court to substitute its judgment of what New Mexico law should be as long as the state of the law in New Mexico does not contravene the Constitution of the United States. It was demonstrated by the Respondent before the New Mexico Supreme Court that the interpretation of Respondent's policy given by that Court is an accord with the prevailing weight of authority in the United States. *Continental Cas. Co. vs. Davidson*, 463 S.W. 2d 652 (Ark. 1971); *Prudence Life Ins. Co. vs. Wooley*, 182 So. 2d 393 (Miss. 1966); *Stout vs. Central Nat'l Life Ins. Co.*, 522 S.W. 2d 124 (Mo. 1975); *Rogers vs. Mutual Life Ins. Co.*, 122 S.W. 2d 5 (Mo. 1938); *Lainum vs. Continental Cas. Co.*, 469 P.2d 964 (Wash. 1970).

Furthermore, the critical element of the decision in the New Mexico Supreme Court involved a determination of facts. It should not be the function of this Court to substitute its judgment on the

facts for that of the state court. Thus, it is well settled that certiorari is not granted to review evidence. *United States vs. Johnston*, 268 U.S. 220, 45 S.Ct. 496 (1925). And, jurisdiction of this Court should not be exerted simply to review a state court's findings and conclusions of fact. *Fry Roofing Co. vs. Wood*, 344 U.S. 157, 73 S.Ct. 204 (1952); *Grayson vs. Harris*, 267 U.S. 352, 45 S.Ct. 317 (1925); *Portland Ry. Co. vs. Railroad Comm.*, 229 U.S. 397, 33 S.Ct. 820 (1913).

In summary, the legal question of the interpretation of Respondent's policy language had not been settled in New Mexico by prior decision. The New Mexico Supreme Court resolved that problem in a manner consistent with the interpretation of such contractual language in other jurisdictions. It further found, under the facts, that the Petitioner did not meet the requisite standard of total disability under the policy and its interpretation of the language. The Petitioner was not "singled out ... for unequal treatment" and was not, therefore, deprived of any constitutional rights.

III.

Petitioner's third point for granting his Petition for Writ of Certiorari is akin to the second point. The argument is to the effect that he contracted for long-term disability insurance at a time when there was a certain interpretation of disability policies in New Mexico; that the New Mexico Supreme Court decision in this case changed that interpretation; and, therefore, he was deprived of property without due process of law. Petitioner fails, however, to specify what the New Mexico law was at the time of contracting; and, what change was effected.

Respondent contended before the New Mexico Supreme Court that the policy involved contained two types of disability clause -- occupational disability during the first two years and general disability thereafter. Occupational disability clauses have been interpreted to mean that an insured is totally, occupationally disabled if he is unable to perform the substantial and material acts of his regular occupation. *Stoner vs. New York Life Ins. Co.*, 311 U.S. 464, 61 S.Ct. 336 (1940). General disability clauses are usually interpreted to mean that an insured is totally disabled if he is unable to perform

the material and substantial acts necessary to the prosecution of any occupation within his education, training and experience. *World Ins. Co. vs. Hall,* 384 F.2d 138 (5th Cir. 1967). Neither of the two New Mexico decisions which pre-dated the Petitioner's policy involved an interpretation of both parts of a general disability policy containing occupational and general disability clauses. The issue was a novel one in New Mexico. Thus, the point is, that the New Mexico Supreme Court did not change the law or any of the Petitioner's contract rights by virtue of its interpretation.

Furthermore, the instant case was decided on the basis of certain findings of fact and not any novel, or different, legal interpretation. The New Mexico Supreme Court noted the evidence as follows:

> "The evidence was that on or about October 1, 1970, Getz suffered a coronary thrombosis or myocardial infarction and that he does have arteriosclerosis. A myocardial infarction causes some heart muscle damage, and, upon healing, leaves some scar tissue in the heart muscle. He was hospitalized on October 1, 1970, and remained in the hospital for about three weeks. After his discharge from the hospital he remained at home until December 7, 1970. He was largely resting and recuperating, but was permitted to engage in limited physical activity. On December 7, 1970, he returned to his work, but he was limited to four hours per day. In February 1971, he was returned to the performance of the full duties of his employment. In addition, he was on a program of physical exercise, including jogging. By the middle of 1971 he was jogging a mile of more, four or five days a week."

* * *

"In support of his position that he is wholly and continuously disabled to the extent required by this provision of the policy, Getz relies primarily upon his claim that all jobs for which he is fitted or may become reasonably fitted involve stress, and that after his retirement from Sandia he mailed out to different employers approximately 100 job applications and did not secure employment.

"The fact that there is stress in any job, or even in living, and the fact that he received no offer of a job in response to his applica-

tions, is no evidence of substance that he is wholly and continuously disabled from performing the duties of any occupation or performing any work for compensation for profit which he is or may become reasonably fitted by education, training or experience. He jogs for about a mile four or five times a week, he gardens, he fishes and he boats, and there is no evidence that he is unable to perform any of the ordinary activities of a normally sedentary life, or perform the duties of many types of employment for which he is or may become fitted.

"The physicians who had treated and examined him and who testified at trial, classified him as Class I or Class II under the functional classification and either Class A or Class B under the therapeutic classification of the American Heart Association Classifications for heart patients....

* * *

"Both physicians who testified on behalf of Getz stated there were certain types of employment which he could perform. His treating physician named drafting and technical writing as two forms of employment in which he could engage. The other doctor made the general statement that Getz could perform light and sedentary types of work. Work as a mechanical engineer was repeatedly referred to by witnesses as being sedentary. There is evidence that Getz' duties in engineering design did involve some stress, perhaps more than at least some other employments in the field of mechanical engineering. His employment also required occasional lifting of heavy equipment for which he would seek assistance, since his doctor advised he should not lift heavy objects. However, because his particular duties caused him some discomfort and distress three or four times a week and involved occasional physical activity which he could not perform alone, it does not follow that he is wholly and continuously disabled from performing the duties of any occupation or performing any work for compensation or profit for which he is or may become reasonably fitted by education, training or experience. There was undisputed testimony from a vocational analyst concerning many types of employment which Getz could do, and his treating physician testified he would be better off psychologically if he did work."

Thus, according to the New Mexico Supreme Court, the Petitioner

failed to prove that he was wholly and continuously unable to perform the material acts necessary to the prosecution of his occupation as a mechanical engineer and that he was wholly and continuously unable to perform the material acts necessary to the prosecution of any occupation for which he was fitted by reason of education, training and experience.

Petitioner asserts that the public policy of New Mexico to compensate individuals for disability is embodied in the New Mexico Workmen's Compensation Act. Section 59-10-12.18 N.M.S.A. (1953 Comp.). That section provides:

> "59-10-12.18 Total Disability. -As used in the Workmen's Compensation Act [59-10-1 to 59-10-37], 'total disability' means a condition whereby a workman by reason of an injury arising out of, and in the course of, his employment, is wholly unable to perform the usual tasks in the work he was performing at the time of his injury, and is wholly unable to perform any work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience."

It is interesting to note that the test of total disability under the New Mexico Workmen's Compensation Act, relied upon by the Petitioner, is almost identical to the language of the Respondent's policy. It is difficult, therefore, to understand how the Petitioner can assert that the decision in the instant case was contrary to the public policy of the State of New Mexico.

Finally, it might be pointed out that certain other assertions by the Petitioner under Point III are without any evidentiary foundation and otherwise take certain liberties with the actual facts. The Petitioner was not discharged from employment because of inability to perform work as a consequence of his physical condition. Testimony revealed that his physical condition had nothing to do with the layoff. (Tr. 245). He was retired early as a part of a general layoff of the least productive employees. And, Petitioner had always been one of the employer's least productive employees. Neither was there any evidence that the Petitioner purchased Respondent's long-term disability insurance based upon a particular interpretation of disability

insurance policies by the New Mexico Supreme Court. Petitioner would lead us to believe that, despite the clear, unequivocal and unambiguous language of Respondent's policy, the New Mexico Supreme Court would have interpreted such language to mean that an insured was totally disabled if substantially unable to perform the material acts of his regular occupation, regardless of his ability to perform other work; that he was aware of such interpretation; and, that he contracted in reliance that the Supreme Court would interpret his disability policy in that manner. The assertion is so incredible that it merits no further comment. The New Mexico Supreme Court had never interpreted two-part disability policies similar to the Respondent's, in the manner alleged; and, even if it had, Petitioner failed to sustain his burden of proof. He did not prove an inability to perform substantially all the acts material to the occupation of a mechanical engineer, much less any other occupation for which he was fitted by reason of education, training and experience.

IV.

The Petitioner's Federal questions were not all timely raised. There can be no question that the Petitioner failed to properly assert his claim that Chief Justice Oman was disqualified from participating in the case. That contention was raised for the first time on a Motion for Rehearing. Petitioner knew, or should have known, of the ground for disqualification at the time of oral argument, almost ten months before the Supreme Court decision. The ground for disqualification, if any existed, should have been brought to the attention of the New Mexico Supreme Court as soon as the Petitioner was aware of it. His failure to do so prevents his obtaining further relief by way of Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for Writ of Certiorari to review the order and decision of the Supreme Court of the State of New Mexico be denied.

Respectfully submitted,

MODRALL, SPERLING, ROEHL, HARRIS AND SISK
Peter J. Adang
Attorney for Respondent
800 Public Service Building
P.O. Box 2168
Albuquerque, New Mexico 87103
505-243-4511